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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945.

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Of Counsel:
REAVIS & MCGRATH,
DECHERT, PRICE & RHOADS.

ARNOLD R. GINSBURG,
1030 Suburban Station Building,
Philadelphia, Pennsylvania. 19103

ROBERT THRUN,
1 Chase Manhattan Plaza,
New York, New York. 10005

GEORGE J. MILLER,
1600 Three Penn Center Plaza,
Philadelphia, Pennsylvania. 19102

Attorneys for Philadelphia Transportation Company, et al.

FRANCIS T. ANDERSON,
1103 Alfred Avenue,
Yeadon, Pennsylvania. 19050

Attorney for Joseph N. Janney, et al.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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REPLY BRIEF.

Petitioners submit this Reply Brief in response to the Brief in Opposition of respondents, Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Philadelphia (City).

Respondents' Brief in Opposition does not dispute that the Pennsylvania courts construed the purchase option between PTC and the City so that SEPTA's enforcement of the declaratory judgment will result in PTC's receiving so much less than the value of its assets that it is probable that PTC's stockholders will receive little or nothing for their capital investment. Respondents do not deny this truth.

The strategy which respondents have pursued ever since this unique judgment was entered has been to preclude the federal courts from considering the legal effect of this truth, which is that enforcement of the judgment will deprive PTC of its rights under the Constitution of the United States. This strategy first took the form of an injunction which enjoined PTC from bringing any federal court action during the pendency of the appeal to the Supreme Court of Pennsylvania. Respondents deliberately sought and obtained that injunction in violation of this Court's decision in *Donovan v. Dallas,* 377 U. S. 408 (1964), that state courts have no power to issue such an injunction.

Now that the judgment has been reviewed by the Supreme Court of Pennsylvania, respondents advance the argument that the injunction which they sought was redundant and therefore "harmless error" because, they assert, the decree of the Philadelphia court would in any event have been entitled to conclusive res judicata effect in

the federal district court even during the pendency of the appeal to the Pennsylvania Supreme Court, and therefore "the question of the propriety of the injunction is now moot".

This argument is specious because it has already been rejected by this Court in *Donovan v. Dallas,* 377 U. S. at 412-13. Moreover, it deliberately ignores the only Pennsylvania Supreme Court decision which is directly on point. In *Columbia National Bank v. Dunn,* 207 Pa. 548, 56 Atl. 1087 (1904), the Pennsylvania Supreme Court *held* that the pendency of an appeal from a decree dismissing a suit in equity precluded the assertion of that decree as a bar in an action-at-law.* The same holding was reached in *Robbins v. Crown,* 76 Montg. 51 (Pa. C. P. 1958). To the same effect, see *Bryar v. Campbell,* 177 U. S. 649, 654 (1900) (discussing Pennsylvania law); *Souter v. Baymore,* 2 Pa. 415 (1847) (following federal admiralty law); *Hugg v. Brown,* 6 Whart. 468 (Pa. 1841) (arbitral award not binding pending appeal); *Rankin v. Iron City Sand & Gravel Corp.,* 71 F. Supp. 26 (W. D. Pa. 1947) (dictum).

Whether or not federal constitutional issues litigated in federal-court actions are subject to state rules of res judicata, see *Williams v. Murdoch,* 330 F. 2d 745, 751 (3d Cir. 1964); *Boothe v. Baker Indus., Inc.,* 262 F. Supp. 168 (D. Del. 1966), the federal courts should not accord state-court decisions any more conclusive effect as to both state and federal law issues than those decisions bear under their own state law, *cf.* 28 U. S. C. § 1738. In finding that law the federal courts should rely on *holdings* of the state courts and not *obiter dicta* uttered in decisions with little or no

* For text authorities "that the pendency of an appeal from a [Pennsylvania] judgment prevents its operation as res judicata," see Annot., 9 A. L. R. 2d 984, 994-95 (1950); Am. Jur., *Judgments* § 341, at 385 n. 11 (1958); C. J. S., *Judgments* § 623 at 49 n. 71 (1947); *id.* § 701 (1967 Cum. Ann. Pock. Pt. at 40).

relation to the point in issue and which do not indicate any reasoned disagreement with previous state precedents. See *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198, 204 (1956); *West v. American Tel. & Tel. Co.*, 311 U. S. 223 (1940).

In both *Wallace's Estate*, 316 Pa. 148, 174 Atl. 397 (1934), and *Helmig v. Rockwell Mfg. Co.*, 389 Pa. 21, 131 A. 2d 622, *cert. denied*, 355 U. S. 832 (1957), cited by respondents, the prior judgments had already been affirmed on appeal. The quotation in *Wallace's Estate, supra*, 316 Pa. at 153, 174 Atl. at 399 (1934), quoted in respondent's brief, p. 27, is pure dictum from a decision which did not involve the point at issue, did not discuss or cite precedents to the contrary, nor did it indicate any reasoned disagreements with these precedents. *Helmig v. Rockwell Mfg. Co., supra*, 389 Pa. at 29, 131 A. 2d at 626, merely quotes the same language from *Wallace's Estate, supra*, again without relation to the facts of the case and to direct holdings to the contrary. *Makariw v. Rinard*, 222 F. Supp. 336, 338 (E. D. Pa. 1963) (Wood, J.), *rev'd on other grounds*, 336 F. 2d 333 (3d Cir. 1964), erroneously stated the Pennsylvania rule on this point, also quoting the dictum in *Wallace's Estate, supra*, and was reversed by the Third Circuit on a related point of the Pennsylvania res judicata rule. The older Pennsylvania cases cited by respondents preceded and must be understood to have been overruled by *Columbia Nat'l Bank v. Dunn*, 207 Pa. 548, 56 Atl. 1087 (1904), to the extent they are contrary.*

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* *Merchants Ins. Co. v. DeWolf*, 33 Pa. 45, 75 Am. Dec. 577 (1859), is also distinguishable in that it was an action to enforce a New York judgment, which under New York law was not stayed pending appeal and which law the Pennsylvania court was bound to respect. *Marsh v. Pier*, 4 Rawle 273, 288, 26 Am. Dec. 131 (Pa. 1833), is mere dictum, since the prior judgment there involved had not been appealed.

This belated argument should not be considered by this Court. Respondents obviously did not think that the judgment of the Court of Common Pleas barred PTC from litigating their rights in a federal court when they sought the injunction. They then thought, and correctly so, that res judicata would not attach until all appeals had been exhausted.

This Court should not grant respondents the benefit of this unlawful injunction by now denying certiorari with the result that all appeals will have been exhausted. It should, instead, either grant or withhold action on the writ as suggested in the petition to enable PTC to establish in the action now pending in the United States District Court for the Eastern District of Pennsylvania their federal rights which have been frustrated by respondents. The truth is that enforcement of the judgment will leave PTC's stockholders with little or no compensation at all for their capital investment in a profitable company and the United States Constitution prohibits an agency of the state from enforcing such a wholly confiscatory judgment.

Since some of the factual inaccuracies in respondents' brief may mislead the Court, they require correction here. First, respondents state that, "The core of the transit system is owned by the City." (P. 5). Petitioners are not seeking and have never sought compensation for the City's property or for any values flowing from the City's grant of franchises. The truth of the matter is, however, that the heart of the Philadelphia transit system is not the Broad Street subway, which the City owns, but the Market Street subway-elevated, the major and most important part of which is owned by PTC, and PTC's wholly-owned, city-wide bus transportation system, including buses and other rolling stock, real estate, shop

and other facilities and equipment which have a market value completely independent of the franchise rights. The City's investment in subway construction has been based on political considerations in which the removal of blighting influences have played at least as great a part as has the desire to develop an efficient transit system. There was certainly no subsidy granted PTC by the City, and indeed the Broad Street Subway is operated by PTC at a loss (Tr. 1010).

Secondly, respondents' statement that "neither PRT nor PTC was able or willing to finance the cost of a single major expansion of the transit system" (p. 8) deliberately ignores the fact that PTC has in the past several decades converted most of the former street railroad system into a bus system.

Thirdly, respondents' quotation in their Brief in Opposition, p. 9, from the statement of PTC's president before the City Council (R. 389), that "this litigation would make it virtually impossible to finance the acquisition of PTC by the option method", is taken out of context of the preceding sentence in which respondent SEPTA's counsel is quoted as stating "that even though the City Solicitor and SEPTA counsel believe the option is enforceable, they recognize that there are serious questions involved." Respondents' suggestion that this litigation was frivolously instigated by petitioners is belied by the statements of SEPTA's own counsel, which is also part of the Record before this Court.

Finally, respondents' brief maligns PTC, its directors and stockholders, for delays inherent in protecting their interests and presenting their legal position in this state court proceeding initiated by respondents and because of the stockholders' exercise of their right to reject a settlement after PTC's Board of Directors had accepted and

recommended that settlement (see Appendix D, pp. 174-75a). While irrelevant here, these comments do point up that the real issues in this litigation are the immediate personal rights of all of PTC's 14,000 public stockholders.

A state agency is here attempting to acquire PTC's assets by enforcing a state court judgment which is so confiscatory as to leave their stockholders little or nothing for their capital investment. Certainly the Constitution prohibits that. Certiorari should be granted.

Respectfully submitted,

ARNOLD R. GINSBURG,
ROBERT THRUN,
GEORGE J. MILLER,
Attorneys for Philadelphia Transportation Company et al.,

FRANCIS T. ANDERSON,
Attorney for Joseph N. Janney, et al.

Of Counsel:

REAVIS & MCGRATH
DECHERT, PRICE & RHOADS